IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

TUESDAY, THE 20TH FEBRUARY 2007 / 1ST PHALGUNA 1928

SA.No. 522 of 1996()

AS.119/1992 of D.C. & SESSIONS COURT,KOLLAM
OS.1127/1984 of PRL.M.C., KOLLAM

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APPELLANTS/APPELLANTS/DEFENDANTS:

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1. P.SUMATHYKUTTY AMMA, NARAYANAVILASOM VEEDU, KOTTAKKAKOM CHERRY, THRIKKADAVOOR VILLAGE NOW RESIDING AT KOCHUVEETTIL VADAKKATHIL VEEDU PUNUKKANNOOR, PERUMPUZHA, KOLLAM.

2. GOPALA PILLAI SIVADASAN PILLAI

BY ADV. SRI.C.V.VASUDEVAN

RESPONDENT/RESPONDENT/PLAINTIFF:

RAJENDRAN PILLAI, KALLUMPURATHU VEEDU, KOTTAKKATHU CHERRY, THRIKKADAVOOR VILLAGE, KOLLAM.

BY ADV. SRI.B.SURESH KUMAR

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 20/02/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR, J.

S.A.NO.522 OF 1996

JUDGMENT

20.02.07.

M.SASIDHARAN NAMBIAR,J.

S.A.NO.522 OF 1996

DATED THIS THE 20th DAY OF FEBRUARY, 2007

JUDGMENT

Defendants in O.S.1127/84 on the file of Munsiff Court, Kollam are challenging the concurrent decree and judgment passed in favour of respondent/plaintiff. Respondent instituted the suit contending that he was subscriber to chitty No.3/80 conducted by appellants. He joined for 10 numbers of chitties each for Rs.1,000/- on monthly instalments of Rs.25/- for 40 months. First appellant was the Foreman and her husband, second appellant, was the manager and they conducted the chitty up to 35 instalments and respondent paid subscription upto 35 instalments. The chitty collapsed due to failure of appellants. Inspite of notice by respondent demanding the amount, appellants did not pay the same. It was contended that respondent is entitled to a decree for realisation of Rs.11,150/- with interest by sale of the properties attached in the suit.

2. Appellants in the written statement admitted that first appellant as Foreman conducted Chitty No.3/80. But it is contended that respondent was not a subscriber and he did not make any payment as alleged. It was also ontended that the chitty collapsed

after 35 instalments as the second appellant obtained a job as security guard in a Company at Ahmmedabad and first appellant happened to accompany him and during their absence miscreants including respondent, who are not subscribers to the chitty trespassed into their house, chitty office and hotel and dismantled them and took away all the furniture, chitty registers and records and a complaint was filed before the Ancahalummoodu Police and the documents produced by respondent is a fabricated document and respondent is not entitled to the decree sought for.

3. Learned Munsiff framed necessary issues. On the evidence of PW1,Dws 1 to 3 and exhibits A1 to A4, B1,B2 and X1 series and X2, learned Munsiff held that first appellant as Foreman conducted the chitty and respondent was a subscriber of ten numbers of chitties and he paid 35 instalments and the chitty collapsed due to the default of the appellants and respondent is therefore entitled to the decree sought for. The suit was decreed. Appellants challenged the decree and judgment before District Court, Kollam. Learned District Judge on re-appreciation evidence confirmed the decree and judgment and dismissed the appeal. It is challenged in this appeal.

4. Following substantial questions of law was formulated.

i) Whether respondent is entitled to get a decree against second appellant/second

defendant, who is not a Foreman, but even according to respondent, was only the Manager.

ii) Whether the Courts below committed error in appreciation of evidence in finding that respondent was subscriber to the chitty conducted by first appellant.

5. Arguments of learned Counsel appearing for appellants was that even according to respondent, the chitty was conducted by first appellant as Foreman and second appellant though her husband, was only the manager and therefore, for the repayment of the amount made by respondent as subscriber of the chitty, no decree could be granted as against second appellant and therefore the decree as against second appellant is unsustainable. It was also argued that Courts below should not have ignored exhibits X1 series list of subscription of chitty No.3/80 produced from the office of Sub Registrar and maintained there as provided under the provisions of Chitties Act and Ext.X2 does not show that respondent was a subscriber to the chitty and therefore the case of respondent that he was a subscriber should have been rejected. It was also argued that Courts below on the evidence should have found that respondent is not entitled to the decree granted by Courts below.

6. Learned Counsel appearing for respondent argued that the liability of second appellant was not challenged before the Courts below and therefore in the second appeal that question cannot be raised by appellants. It was also argued that there were several cases against appellants for realisation of the amount paid by subscribers up to 35 instalments and in all those cases this Court upheld the decree passed by the trial Court against both the appellants and in such circumstances the appeal is only to be dismissed.

7. Plaint allegation itself is that the chitity was conducted by first appellant as Foreman. The case was that second appellant, husband of first appellant, was the Manger of the Chitty. Under Section 2(6) of Kerala Chitties Act, Foreman is defined as means the person who, under the variyola, is responsible for the conduct of the chitty and includes all persons taking his place under Section 35. Section 35 comes into play in the case of the death of a Foreman. Therefore the Foreman is the person who is responsible for the conduct of the chitty under the variyola. When respondent in the plaint itself admits that chitty was conducted by first appellant as Foreman and second appellant her husband, was acting only as the manager, there is force in the submission of learned Counsel appearing for appellants that the decree granted as against second appellant is not sustainable. It is seen from the written statement

filed before the trial Court that this aspect was specifically pleaded by appellants. Unfortunately learned Munsiff and learned District Judge did not specifically consider the question. When even according to respondent the chitty was conducted by first appellant as Foreman, remedy of respondent is only to realise the amount from the Foreman. Even if her husband was acting as the Manger, he has no personal liability to pay the amount due under the chitty and therefore the decree as against second appellant is not sustainable.

8. Though learned Counsel appearing for appellant relying on Ext.X2 vehemently argued that respondent is not a subscriber as his name does not figure in Ext.X2, learned Munsiff and learned District Judge on appreciation evidence found that no reliance could be placed on Ext.X2. Ext.A1 series of chitty receipts issued by first appellant to respondent establish that he was a subscriber to the chitty. Ext.X2 was not a list prepared as provided under the Chitties Act or Rules. Courts below appreciated the evidence in the proper perspective and found that contention of appellants that respondent is not a subscriber to the chitty cannot be accepted. Nothing was pointed out to hold that factual finding arrived at by the Courts below was against the evidence. I find no reason to interfere with that factual finding of Courts below. Therefore respondent is entitled to the decree granted only against the first appellant.

Appeal is partly allowed. Decree granted by learned Munsiff in O.S.1127/84 and confirmed by learned District Judge, as against second appellant/second defendant is set aside. Decree granted as against first defendant/first appellant is confirmed. Suit as against second appellant dismissed.

M.SASIDHARAN NAMBIAR,JUDGE

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